PAKATA SDN BHD

v.

CHEAN SEONG FATT & ORS

HIGH COURT MALAYA, ALOR SETAR
ARIFIN ZAKARIA J
[CIVIL SUIT NO: 22-118-2000]
10 MAY 2001

CIVIL PROCEDURE: *Striking out - Writ and statement of claim - Whether reasonable cause of action disclosed - Whether breaches complained of fall under Pengurusan Danaharta Nasional Berhad Act 1998 - Contention that plaintiff had no grounds to seek remedy elsewhere*

CIVIL PROCEDURE: *Locus standi - Whether plaintiff correct party to institute and maintain action*

The 1st defendant sought to strike out the plaintiff's writ against him for breach of statutory and fiduciary duties on two grounds. Firstly, that the writ and the statement of claim did not disclose any reasonable cause of action, and secondly, that the plaintiff did not have any *locus standi* to institute and maintain this action.

The plaintiff alleged that the 1st defendant obstructed the special administrators by refusing to allow them to take possession of the plaintiff's premises. The plaintiff also alleged that some of its stock and machinery had been removed and it also lodged complaints concerning its books and statement of affairs. The 1st defendant argued that since all these complaints had remedies which were provided by the Pengurusan Danaharta Nasional Berhad Act 1998 ("the Act"), the plaintiff could not seek remedy elsewhere. He also contended that since the duties and obligations under the Act were owed to the special administrators, the action should have been brought in their name.

Held:

[1] The acts and omissions complained of clearly fall within the ambit of the Act. Since the Act provides criminal sanctions for such breaches, the plaintiff could not institute a civil action seeking remedy elsewhere against the 1st defendant. Therefore, the facts as alleged in the endorsement of claim to the writ and in the statement of claim did not disclose any cause of action against the 1st defendant.

[2] The special administrators were responsible for the administration of the plaintiff company and were deemed to be acting as the agent of the affected person. Therefore, the plaintiff was the proper party and it had the *locus standi* to institute this action.

Per curiam:

[1] The 1st defendant also raised two alternative grounds to have the writ set aside. Firstly, that there was an irregularity in the writ as it should have been a 12 day writ instead of an eight day writ, and secondly, that the name on the writ was wrong and therefore the wrong person had been sued. Both these grounds were rejected as the irregularity was curable under O. 2 r. 1(2) of the Rules of the High Court 1980, and the 1st defendant had accepted the writ in spite of the spelling error.

[Application allowed.]

Case(s) referred to:

Hu Sepang v. Keong On Eng & Ors [1991] 2 CLJ 999 ***(refd)***

Metroinvest Anstalt and Ors v. Commercial Union Assurance Co Plc [1985] 2 All ER 318 ***(refd)***

Pasmore v. Oswald Twistle Urban Council [1898] AC 387 ***(refd)***

Seng Loong Trading Co. v. Angel Departmental Stores Sdn Bhd [1987] 1 MLJ 310 ***(refd)***

Legislation referred to:

Pengurusan Danaharta Nasional Berhad Act 1998, ss. 28(1), 32, 36(4), 37(6), 39A, 299

Rules of the High Court 1980, O. 2 r. 1(2), O. 12 r. 4

For the plaintiff - Colin Andrew Pereira (Mohan Singh with him); M/s KM Chye & Murad

For the defendant - Oh Choong Ghee; M/s Zainal Azahar & Co

Reported by Suresh Nathan

JUDGMENT

Arifin Zakaria J:

This is an application by the first defendant (encl. 27) for the following orders:

1. That the amended writ and all the subsequent proceedings including all orders obtained by the plaintiff be struck off and/or set aside with costs;

2. That the cost of this application and supplementary thereto be paid by the plaintiff to the 1st defendant; and

3. Further other order or relief as the court deems fit.

Three affidavits were filed in connection with this application namely, the 1st defendant's affidavit in support (encl. 28), the plaintiff's affidavit-in-reply (encl. 38) and the 1st defendant's affidavit-in-reply (encl. 44).

The 1st defendant's application may be segmented into two parts i.e. the application for striking out of the writ and the alternative application for setting aside of the writ.

Application For Striking Out Of The Writ

The first defendant seeks to strike out the writ on two grounds namely:

a) that the writ and the statement of claim do not disclose any reasonable cause of action; and

b) that the plaintiff does not have any *locus standi* to institute and maintain this suit.

(a) No Reasonable Cause Of Action

The 1st defendant contended that the writ and the statement of claim do not disclose any reasonable cause of action against the 1st defendant. To determine this issue it is necessary to consider the endorsement on the writ and the facts as alleged in the statement of claim. The endorsement on the amended writ (encl 6) reads:

> Tuntutan Plaintif ialah untuk perintah-perintah injunksi bagi membendung defendan-defendan daripada menghalang Pentadbir Khas yang dilantik bagi Plaintif, akaun dan siasatan (accounts and investigations), gantirugi bersama dengan faedah dan kos dan relif-relif selanjutnya yang Mahkamah yang Mulia ini anggap sesuai.

The cause of action as disclosed in the statement of claim are found in paras. 15 and 16 thereof which reads as follows:

> 15. In the premise, the Plaintiff avers that the Defendants have breached their statutory duties to the Plaintiff causing the Plaintiff to suffer loss and damage.
>
> 16. Further and/or in the alternative, the Plaintiff avers that the Defendants have by virtue of their conduct, breached their fiduciary duties to the Plaintiff.

The alleged breach of the statutory and fiduciary duties are set out in paras. 9 to 13 of the statement of claim. In para. 9 the plaintiff claims, *inter alia*, that the 1st defendant obstructed the special administrators from performing their function by refusing to allow the special administrators to take possession of the plaintiff's premises. It is also claimed that certain stock

and machinery of the plaintiff had been removed. These complaints by the plaintiff are covered by ss. 39 and 39A of the Pengurusan Danaharta Nasional Berhad Act 1998 ("the Act") and the remedies are found therein. As for the complaints as set out in paras. 10 to 13 of the statement of claim, which relate to the books of the plaintiff and statement of affairs of the plaintiff, they are clearly governed by ss. 36 and 37 of the Act and the remedies are found in ss. 36(4) and 37(6).

The learned counsel for the 1st defendant argued that since all these complaints, on which the plaintiff founded this action, are governed by the Act and the remedies are provided therein it is therefore not open for the plaintiff to seek the remedy elsewhere. The 1st defendant's counsel relied on the case of *Pasmore v. Oswald Twistle Urban Council* [1898] AC 387 in support of the said proposition of law. In that case the plaintiff claims a *mandamus* commanding the defendants to cause to be made such sewers as may be necessary for effectually draining their district for the purposes of the Public Health Act 1875 and to give facilities for enabling the plaintiff to carry the liquids proceedings from his factories or manufacturing processes into the sewers under their control. There it was held that the only remedy for neglect of the duty is that given by s. 299 of the Act, a complaint to the Local Government Board.

Delivering judgment of the House, Earl of Halsbury LC stated at p. 53:

> The principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law. I think Lord Tenterden accurately states that principle in the case of *Doe v. Bridges* (1). He says: "Where an Act creates an obligation and enforces the performance in a specified manner, we take to be a general rule that performance cannot be enforced in any other manner." The words which the learned judge, Lord Tenterden, uses there appear to be strictly applicable is to this case. The obligation which is created by this statute is an obligation which is created by the statute and by the statute alone. It is nothing to the purpose to say that there were other statutes which created similar obligations, because all those statutes are repealed; you must take your stand upon the statute in question, and the statute which creates the obligation is the statute to which one must look to see if there is a specified remedy contained in it. There is a specified remedy contained in it, which is an application to the proper government department.

In *Hu Sepang v. Keong On Eng & Ors* [1991] 2 CLJ 999, Lim Beng Choon J at p. 1001 made the following observation:

> From the pleadings of the Plaintiff there is no doubt that he firstly pegged his cause of action on breach of statutory duty on the part of the first and second

> Defendants. It has been said that to establish civil liability for a breach of statutory duty the Plaintiff must show that: (a) the injury he has suffered is within the ambit of the statute, (b) the statutory duty imposes a liability to civil action, (c) the statutory duty was not fulfilled, and (d) the breach of duty has caused his injury.

And at p. 1001 he said:

> Finally I must remind myself that if a statute creates a duty but imposes no remedy civil or criminal for its breach, there is a presumption that a person who is injured thereby will have a right of action for otherwise, 'the statute would be but a pious aspiration' (... judgment of Lord Simons at page 407 in *Cutler v. Wandsworth Stadium Ltd.*)

Considering the statute before us I must say that the acts and omissions complained of by the Special Administrators clearly fall within ss. 36, 37, 39 and 39A of the Act. Any breach of the said sections constitute an offence under ss. 36(4), 37(6), 39 or 39A of the Act respectively. Based on the above, the learned counsel for the 1st defendant contends that since criminal sanction has been provided for any breach of the said sections, therefore, civil action would not lie against the 1st defendant. I am of the considered opinion that, on the authorities cited above, there is force in his argument. It should always be borne in mind that the obligations or duties imposed on the 1st defendant as director of the plaintiff are created by the Act. Therefore, one should look for the remedy for any breach of the said obligations or duties under the relevant statute and not anywhere else unless the statute does not provide for any remedy. In this case the Act clearly provides criminal sanctions for the breach of any provisions of the said sections. It is therefore not open to the plaintiff to institute this action against the 1st defendant for the purpose of seeking remedy for the alleged breach of the said provisions of the Act. For those reasons I agree with the submission of the learned counsel for the 1st defendant that the facts as alleged in the endorsement of claim to the writ and in the statement of claim do not disclose any cause of action against the 1st defendant.

(b) *Locus Standi*

The next issue raised by the 1st defendant is the lack of *locus standi* on the part of the plaintiff to institute and maintain this action. The 1st defendant's contention is that under the Act the obligation and duties as stated in the statement of claim are owed to the special administrators and not to the plaintiff company. Therefore, if any action is to be brought against the 1st defendant under the Act then it should properly be brought in the name of the special administrators and not in the name of the plaintiff company. The

learned counsel for the plaintiff on the other hand contended that the special administrators are by virtue of s. 28(1) responsible for the administration of the plaintiff company as from the date of their appointment until it is terminated by the Pengurusan Danaharta Nasional Bhd. Under s. 32 of the Act it is provided that the special administrator shall, in the administration of the affected person, be deemed to be acting as the agent of the affected person. On that premise the learned counsel argued that the Pakata Sdn Bhd, the plaintiff here, is a proper party. I am of the view that the plaintiff's argument here is supported by the provisions in ss. 28(1) and 32 of the Act and on that premise I hold that the plaintiff has the *locus standi* to institute this action.

Application For Setting Aside The Writ

In the alternative the 1st defendant seeks to have the writ and the subsequent proceedings set aside on the following grounds. Firstly, the 1st defendant contended that the writ should have been a 12 day writ instead of the eight day writ as stated in the amended writ. In the amended writ the 1st defendant's address is stated as No. 15, Jalan Sadao, Padang Besar, Perlis. This, the 1st defendant contended is outside the local jurisdiction of the court and for that the reason the writ should have been a 12 day writ instead of eight. Order 12 r. 4 of Rules of the High Court 1980 ("the RHC") provides:

> References in these rules to the time limited for appearing are references:
>
> (a) in the case of writ served within the local jurisdiction of each High Court in Malaya, to 8 days and served outside such local jurisdiction but within the jurisdiction of Malaya, to 12 days after service of the writ (including the day of service) or, where that time has been extended by or by virtue of these rules, to that time so extended

The 1st defendant referred the court to the case of *Seng Loong Trading Co. v. Angel Departmental Stores Sdn Bhd* [1987] 1 MLJ 310. There the defendant applied by summons-in-chambers for an order to set aside a writ of summons and the service thereof on the ground that the time limited for appearance within eight days was irregular and did not comply with O. 12 r. 4 of the Rules of the High Court 1980. The court there allowed the defendant's application. At p. 311 Gunn Chit Tuan J (as he then was) stated:

> It is pointed out in *Mallas's Supreme Court Practice* (2nd edn.) at 72 that the provisions of Order 12 rule 4 of the Rules of the High Court in Malaysia take into account the presence of a Registry in each state and make allowance for the possible delay in postal deliveries. For that reason the figure "eight" in the Writ of summons (Form 2) wherever it appears must be amended to "twelve" if a West Malaysia writ is for service in another state in West Malaysia and to "ten" and "twenty" as the case may be in a Writ issued either in Sabah or Sarawak. In the case of the High Court of Malaya at Kuala Lumpur

> it follows, in my judgment, that for purposes of Order 12 rule 4 of the Rules of the High Court, 1980, the expression "local jurisdiction" of this High Court in Malaya means the territory comprised in the State of Selangor and the Federal Territory of Kuala Lumpur, and cannot include the other States of West Malaysia. In the circumstances, I therefore set aside the said Writ and the service thereof with liberty to the plaintiff to file a fresh suit.

The learned counsel for the plaintiff on the other hand contended that the above case does not apply here because here there is more than one defendant and the address of some of the defendants are within the local jurisdiction. For that reason he said it is not possible to endorse the writ with the 12 days period for the defendants to enter appearance. However, in the circumstances I think, the proper thing to do is to take the longer period rather than the shorter period as provided in O. 12 r. 4 of RHC as the writ was intended to be served both within and outside the local jurisdiction of the court. In the circumstances, I agree with the submission of counsel for the 1st defendant that the writ is for that reason irregular. However, the question is, can the irregularity be cured under O. 2 r. 1(2) of the RHC.

In this regard I stand guided by the judgment of the English CA in *Metroinvest Anstalt and Ors v. Commercial Union Assurance Co Plc* [1985] 2 All ER 318, the authority cited to the court by counsel for the 1st defendant. At p. 324 Cumming Bruce LJ said:

> The judgment of this court in *Leal v. Dunlop Bio-Processes International Ltd* [1984] 2 All ER 207, [1984], 1 WLR 874 has been cited before us. As I read the judgments of Stephenson and Slade LJJ, there is no indication therein that in the exercise of jurisdiction under Order 2, rule 1 it was necessary to restrict the exercise of the powers under rule 2(2) to the situation in which, by reason of the irregularity as such, the opposite party had suffered prejudice.
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> I would say that in most cases the way in which the court exercises its powers under Order 2 rule 1(2) is likely to depend on whether it appears that the opposite party has suffered prejudice as a direct consequence of the particular irregularity, that is to say the particular failure to comply with the rules. But I would construe Order 2, rule 1(2) as being so framed as to give the court the widest possible power in order to do justice.

Slade LJ at p. 325 expressed a similar view where he said:

> Once a party to litigation has been guilty of failure of the nature mentioned in rule 1(1) which has not been waived by the other party, the court, in my opinion, has a general discretion under rule 1(2) to make such consequential orders dealing with the proceedings generally as it thinks fit, as *Stephenson v. J in the Leal case* [1984] 2 All ER 207 at 213, [1984] 1 WLR 874 at 882 expressly recognized. Of course this is a discretion which must be exercised judicially. I would readily accept that the irregularity in the present case is of

a nature which the court could and should have rectified, so long as it could have done so without injustice to the defendants: compare, for example, *Harkness v. Bell's Asbestos and Engineering Ltd.* [1996] 3 All ER 843 at 856, [1967] 2 GB 729 at 736 per Lord Denning MR. Furthermore, I accept that prejudice or lack of prejudice to the other party to the litigation is clearly a highly relevant matter in considering the interests of justice; it may be the all – important one.

In the present case it is not in dispute that there has been no prejudice suffered by the 1st defendant as a result of the irregularity in the writ. Having said that, the next question is whether it will be unjust to the 1st defendant if the court were to order that the irregularity be cured under O. 2 r. 1(2). Having considered the relevant facts and circumstances I am of the opinion that the plaintiff is not all prejudiced by the irregularity in the writ and I would therefore answer the question in the negative. On the above premise I hold that the writ is curable under O. 2 r. 1(2) of the RHC.

The next and final ground raised by the 1st defendant is that the 1st defendant's name as appearing in the writ was wrong, therefore, counsel argued, technically the wrong person had been sued. He said the 1st defendant's name is Chen Seong Fatt not Chean Seong Fatt as stated in the writ. On this, I agreed with counsel for the plaintiff that the 1st defendant has not in any way been misled by the spelling error in his name. In fact in para. 5 of the 1st defendant's affidavit at encl. 28 he said that on knowing that the plaintiff was trying to serve the writ on him he then instructed his solicitors to accept the writ on his behalf. In the circumstances, therefore, in no way was the 1st defendant misled by the spelling error in his name as appearing on the writ.

For the above reasons I rejected both the alternative grounds raised by the 1st defendant.

Conclusion

On the above, I allow the 1st defendant's application on the sole ground that the writ and the statement of claim herein do not disclose any cause of action against the 1st defendant. Costs of this action to the 1st defendant to be assessed unless agreed between the parties.